



OFFICE of the ATTORNEY GENERAL
GREG ABBOTT

February 24, 2003

Ms. Dianna D. Wojcik
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Dallas, Texas 75201-3387

OR2003-1174

Dear Ms. Wojcik:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 176933.

The Hurst-Euless-Bedford Independent School District (the "District"), which you represent, received two separate, yet similar, requests for information concerning Melinda Johnston, a District employee. You explain the District has released some of the responsive material to the requestors; however, you assert the submitted information is excepted from disclosure under sections 552.101, 552.102, 552.114, and 552.135 of the Government Code. We have reviewed the information you submitted and we have considered the exceptions you claim.

Initially, we note section 552.022 of the Government Code makes the submitted information expressly public. Section 552.022(a) of the Government Code provides in part as follows:

Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

- (1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108[.]

In this instance, the requested information pertains to a completed investigation conducted by the District. Therefore, the District may withhold this information only to the extent it

is made confidential under other law or is otherwise protected by section 552.108 of the Government Code.

Although you argue some of the submitted information is excepted under the common-law informer's privilege, this discretionary exception is not "other law" for purposes of section 552.022 of the Government Code. The purpose of the informer's privilege is to encourage the flow of information to the government by protecting the identity of the informant. See Open Record Decision Nos. 582 (1990), 579 (1990), 549 (1990). Because the informer's privilege protects the interest of a governmental body, it is a discretionary exception that a governmental body may waive. See Open Record Decision No. 549 at 6 (1990); see also Open Records Decision No. 522 at 4 (1989) (discretionary exceptions in general). Therefore, the informer's privilege, a discretionary exception, does not constitute "other law" that makes information confidential. Thus, the District cannot withhold any of the submitted information under the common-law informer's privilege.

You assert section 552.101 in conjunction with common-law privacy and section 552.102 of the Government Code except information in Exhibit C. Section 552.101 excepts "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Section 552.102 of the Government Code excepts from disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." Gov't Code § 552.102(a). In *Hubert v. Harte-Hanks Texas Newspapers*, 652 S.W.2d 546 (Tex. App.—Austin 1983, writ ref'd n.r.e.), the court ruled that the test to be applied to information claimed to be protected under section 552.102 is the same as the test formulated by the Texas Supreme Court in *Industrial Foundation* for information claimed to be protected under the doctrine of common-law privacy as incorporated by section 552.101 of the Public Information Act (the "Act"). See *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 683-85 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977).

For information to be protected from public disclosure by the common-law right of privacy under section 552.101, the information must meet the criteria set out in *Industrial Foundation*. In *Industrial Foundation*, the Texas Supreme Court stated that information is excepted from disclosure if (1) the information contains highly intimate or embarrassing facts the release of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Id.* at 685. The type of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. *Id.* at 683. Based on our review of the submitted information, we believe the documents do not contain such highly intimate or embarrassing facts as to warrant protection under common-law privacy. Furthermore, the public has a legitimate interest in the statements. See Open Records Decision Nos. 444 at 5-6 (1986) (public has interest in public employee's qualifications and performance and the circumstances of his

resignation or termination), 405 at 2-3 (1983) (public has interest in manner in which public employee performs his job), 329 at 2 (1982) (information relating to complaints against public employees and discipline resulting therefrom is not protected under former section 552.101 or 552.102), 208 at 2 (1978) (information relating to complaint against public employee and disposition of the complaint is not protected under either the constitutional or common-law right of privacy). Accordingly, the District may not withhold the submitted information based on common-law privacy or section 552.102 of the Government Code.

Citing *Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.—El Paso 1992, writ denied), you contend the District should only release the documents in Exhibit B to the requestors because it contains an adequate summary of the investigation. In *Ellen*, the court addressed the applicability of the common-law privacy doctrine to files of an investigation into allegations of sexual harassment. *Id.* The court ordered the release of the affidavit of the person under investigation and the summary of the investigation, stating that the public's interest was sufficiently served by the disclosure of these documents. *Id.* at 525. In concluding, the *Ellen* court held that "the public did not possess a legitimate interest in the identities of the individual witnesses, nor the details of their personal statements beyond what is contained in the documents that have been ordered released." *Id.* In this instance, unlike *Ellen*, the investigation involves allegations of possession of intoxicants on public school grounds, not sexual harassment. We decline to extend *Ellen* to contexts outside the sexual harassment arena to limit the release of information when a summary of an investigation exists.

You claim section 552.101 in conjunction with section 21.355 of the Education Code applies to except the investigation summary report in Exhibit C. Section 21.355 of the Education Code provides, "Any document evaluating the performance of a teacher or administrator is confidential." This office has interpreted this section to apply to any document that evaluates, as that term is commonly understood, the performance of a teacher or administrator. Open Records Decision No. 643 (1996). After reviewing the document at issue, we find the investigation summary report does not fall within the scope of an evaluation. Thus, the District may not withhold the investigation summary report in Exhibit C under section 21.355 of the Education Code.

You contend some of the submitted information is governed and protected from disclosure under section 552.101 in conjunction with the Family Educational Rights and Privacy Act ("FERPA") and section 552.114 of the Government Code. Section 552.026 of the Act provides as follows: "This chapter does not require the release of information contained in education records of an educational agency or institution, except in conformity with the [FERPA]." FERPA provides that no federal funds will be made available under any applicable program to an educational agency or institution that releases personally identifiable information (other than directory information) contained in a student's education records to anyone but certain enumerated federal, state, and local officials and institutions, unless otherwise authorized by the student's parent. See 20 U.S.C. § 1232g(b)(1).

“Education records” means those records that contain information directly related to a student and are maintained by an educational agency or institution or by a person acting for such agency or institution. *Id.* § 1232g(a)(4)(A). Section 552.114 excepts from disclosure student records at an educational institution funded completely or in part by state revenue. Gov’t Code § 552.114(a). This office generally applies the same analysis under section 552.114 and FERPA. *See* Open Records Decision No. 634 at 5 (1995).

In Open Records Decision No. 634 (1995), this office concluded that (1) an educational agency or institution must withhold from public disclosure information that is protected by FERPA and excepted from required public disclosure by sections 552.026 and 552.101 without the necessity of requesting an attorney general decision as to those exceptions, and (2) an educational agency or institution that is state-funded must withhold from public disclosure information that is excepted from required public disclosure by section 552.114 as a “student record,” insofar as the “student record” is protected by FERPA, without the necessity of requesting an attorney general decision as to that exception. Nevertheless, you have submitted the documents at issue to this office for consideration, so we will consider whether they contain information excepted from disclosure under sections 552.026 and 552.114 of the Government Code.

In this instance, the District maintains the requested information, which pertains to a student and the parent of that student. Therefore, we agree the submitted documents consist of education records as defined by FERPA. *See* 20 U.S.C. § 1232g(a)(4)(A). Here, the requestors are neither a parent nor legal guardian of the student named in the document. *See id.* § 1232g(a)(1)(A) (granting parents access to the education records of their children). Furthermore, the requestors have not provided the District with written authorization from a parent or legal guardian of the named student granting them access to the records in issue. *See id.* § 1232g(b)(1). FERPA requires an educational institution to withhold information from required public disclosure only to the extent “reasonable and necessary to avoid personally identifying a particular student or one or both of the student’s parents.” Open Records Decision Nos. 332 (1982), 206 (1978). Therefore, though the District may not withhold any of the information in its entirety in Exhibit C based on FERPA, it must redact the identifying information of the student from all released documents in Exhibit C. We note you have highlighted some of the information requiring redactions; we have marked additional information in Exhibit C.

We address your assertion that section 552.135 of the Government Code excepts some of the submitted information from disclosure. Section 552.135 provides as follows:

- (a) “Informer” means a student or former student or an employee or former employee of a school district who has furnished a report of another person’s or persons’ possible violation of criminal, civil, or regulatory law to the school district or the proper regulatory enforcement authority.

(b) An informer's name or information that would substantially reveal the identity of an informer is excepted from [required public disclosure].

(c) Subsection (b) does not apply:

(1) if the informer is a student or former student, and the student or former student, or the legal guardian, or spouse of the student or former student consents to disclosure of the student's or former student's name; or

(2) if the informer is an employee or former employee who consents to disclosure of the employee's or former employee's name; or

(3) if the informer planned, initiated, or participated in the possible violation.

Gov't Code § 552.135. Because the legislature limited the protection of section 552.135 to the identity of a person who reports a possible violation of "law," a school district that seeks to withhold information under this exception must clearly identify to this office the specific civil, criminal, or regulatory law that is alleged to have been violated. *See* Gov't Code § 552.301(e)(1)(A). You state Exhibit C contains identifying information of individuals who either reported, corroborated, or supplemented allegations made to the District regarding a District employee's violation of section 37.122 of the Education Code, a Class C misdemeanor. Based on your argument and our review of the submitted information, we conclude the District must withhold the identifying information of the individuals who actually reported the alleged violation of law to the District. However, section 552.135 does not encompass protection for witness statements. Therefore, the District may withhold only the identifying information of the informers, which we have marked in Exhibit C, under section 552.135 of the Government Code.

We note Exhibit C contains information subject to section 552.117 of the Government Code.¹ Section 552.117 excepts from disclosure the home address and telephone number, social security number, and family member information of a current or former official or employee of a governmental body who requests that this information be kept confidential under section 552.024. Whether a particular piece of information is protected by section 552.117 must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). Therefore, the District may only withhold information under section 552.117 on behalf of a current or former official or employee who made a request for confidentiality under section 552.024 prior to the date on which the District received the

¹ The Office of the Attorney General will raise a mandatory exception like section 552.117 on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

present request for information. For any employee who timely elected to keep his or her personal information confidential, the District must withhold the employee's home address and telephone number, social security number, and any information that reveals whether the employee has family members. The District may not withhold this information under section 552.117 for an employee who did not make a timely election to keep the information confidential. Thus, we caution the District to ensure it complies with the requirements of section 552.117 of the Government Code by redacting the information we have marked in Exhibit C, if necessary.

Finally, Exhibit C contains a social security number that may belong to an individual who did not properly file an election of confidentiality under section 552.024 of the Government Code. Under these circumstances, this social security number may be excepted from disclosure under section 552.101 of the Government Code in conjunction with the 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I). *See* Open Records Decision No. 622 (1994). These amendments make confidential social security numbers and related records obtained and maintained by a state agency or political subdivision of the state pursuant to any provision of law enacted on or after October 1, 1990. *See id.* We have no basis for concluding that the social security number in the submitted documents is confidential section 405(c)(2)(C)(viii)(I), and therefore, excepted from public disclosure under section 552.101 on the basis of this federal provision. However, we caution the District that section 552.352 of the Public Information Act imposes criminal penalties for the release of confidential information. Prior to releasing any social security number information, you should ensure that the District neither obtained nor maintains such information pursuant to any provision of law enacted on or after October 1, 1990.

In summary, the District must release the information in Exhibit C with the following highlighted and marked redactions: 1) the identifying information of the student under section 552.101 of the Government Code in conjunction with FERPA; 2) the identifying information of the informers under section 552.135 of the Government Code; and 3) if applicable, the information subject to section 552.117 of the Government Code and the 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I).

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the

governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

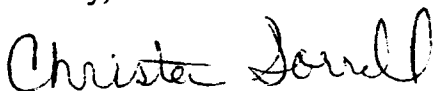
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Christen Sorrell
Assistant Attorney General
Open Records Division

CHS/seg

Ref: ID# 176933

Enc: Submitted documents

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